Nos. 9994 and 9995

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

NATIONAL LABOR RELATIONS BOARD,

Petitioner,

vs.

THE CITIZEN-NEWS COMPANY, a Corporation,

Respondent.

ON PETITIONS FOR THE ENFORCEMENT OF ORDERS OF THE NATIONAL LABOR RELATIONS BOARD

BRIEF FOR THE RESPONDENT.

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Summary of Argument.

I. The National Labor Relations Act is not applicable to respondent.

II. The Board's findings of fact on the matters in controversy are not supported by substantial evidence, and respondent has not violated Sections 8 (1) and (3) of the Act.

III. The Board's orders are not valid or proper under the Act.

ARGUMENT.

POINT I.

The National Labor Relations Act Is Not Applicable to Respondent!

The Board's findings with respect to business of the respondent do not take into consideration certain factors of importance in determining the question of whether a relatively small newspaper is within the jurisdiction of the Act. Not to exceed 10% of the total advertising revenue, and not to exceed 5% of the total revenues, of respondent come from advertising from outside of California. Only ½ of 1%, approximately 130 copies, of the total circulation of approximately 26,000 copies were sent outside California, an inconsequential amount such as would merit no consideration either as a burden upon, or an obstruction to inter-state commerce or the free flow thereof.

The 1938 strike in the plant of respondent did not burden or obstruct commerce or the free flow of commerce in inter-state traffic, nor would a strike today in the plant of respondent either interfere with supplies or orders coming to respondent from without the State, nor would it tend to interfere, burden or obstruct commerce or the free flow thereof.

The case of the *National Labor Relations Board v. Hearst, etc.,* 102 F. (2d) 658 (1939—C. C. A. 9) quoted by appellant, expressly called attention to the fact that the strike did actually halt inter-state shipments, which was not true in the case at bar. It would appear that the

rule laid down in the *Hearst* case is not whether the respondent is engaged in inter-state commerce, but whether a labor dispute in its business substantially affects inter-state commerce or the free flow thereof. Respondent believes there is no evidence in the case to show that a labor dispute of its employees has any affect upon inter-state commerce. Similarly, the cases of the *National Labor Relations Board v. Fainblatt,* 306 U. S. 601, and *National Labor Relations Board v. W. H. Kistler Stationery Co.* (1941) 122 F. (2d) 989, indicate that the percentage of out of state business is not controlling, and that the determining factor is whether or not a labor dispute results in an affect upon inter-state commerce so as to interfere, burden or obstruct the free flow thereof.

Other cases cited by the Board, such as *National Labor Relations Board v. Jones & Laughlin Steel Corp.,* 301 U. S. 1; and *Santa Cruz Fruit Packing Co. v. National Labor Relations Board,* 303 U. S. 453, involving mercantile concerns, where the affect of a labor dispute upon inter-state commerce can be readily ascertained, are not applicable to a small newspaper like respondent. So, too, *National Labor Relations Board v. A. S. Abell Co.,* 97 F. (2d) 951 (C. C. A. 4), involving a newspaper with such extended out of state operations as were designated by the court to be a "substantial volume of business" is not applicable to a small newspaper such as respondent.

The fact that certain of the raw materials going into respondent's publication came from without the State is also not controlling as to whether respondent is within the jurisdiction of the Act. *Santa Cruz Fruit Packing Co. v. National Labor Relations Board (supra).*

POINT II.

The Board's Findings of Fact on the Matters in Controversy Are Not Supported by Substantial Evidence, and Respondent Has Not Violated Sections 8 (1) and (3) of the Act.

(A) Case No. 9994.

The Board held there was no refusal to bargain, and that respondent did not discriminate with regard to the hiring and tenure of employment of Johnson, Scott, Yeaman, and Schlichter, to discourage membership in the Guild.

The Board found [A. R. 135]:

> "That by the continuing expressions of criticism and disparagement of the Guild, the criticism of the use of outside negotiators, the attempt to secure contracts with employees' committees in the various departments, the threat to cut wages in the event that the classified advertising department employees failed to sign a contract, and the threat to discharge employees if a contract with the Guild was consummated, the Respondent interfered with, restrained, and coerced its employees in the exercise of the rights guaranteed in Section 7 of the Act."

This finding is not supported by substantial evidence and the conclusion is unjustified.

The Board states [A. R. 129]:

> "In September and October 1936 the Los Angeles Chapter of The American Newspaper Guild and the Citizen-News Chapter thereof were organized. At various times thereafter certain supervisory employees made disparaging remarks about the Guild. Thus Harold Swisher, Harwood Young, and Harold Wynn, who are respectively managing editor, business man-

ager, and assistant business manager of the Citizen-News, commented unfavorably on the Guild's emphasis, on 'economics' rather than 'ethics' in conversations with Roger Johnson and James Crow, editorial employees of the Citizen-News. Swisher, and at a later date, Harry Brandon, display advertising manager of the Citizen-News, criticized Guild settlements of strikes, the former saying that he did not see what had been achieved by the strikes and the latter, referring to a particular strike, stated that he would be ashamed to belong to an organization that was party to such a settlement."

The Board then states [A. R. 129]:

"In June 1937 the American Newspaper Guild held a convention at which it voted, subject to a referendum, to join the C. I. O. and admit non-editorial employees to membership. About this time Swisher in speaking to Johnson questioned the advisability of the Guild's affiliating with the C. I. O."

Johnson's testimony continues [A. R. 247]:

"Mr. Swisher, the managing editor, talked to me about the Guild and wondered if it was right for the Guild to go into the C. I. O. He felt, he said, that the C. I. O. was a step, perhaps, too far for newspaper men to take at that time."

The Board continues [A. R. 129]:

". . . in the fall of 1937, in connection with stories concerning strikes, he remarked to James Lindsey, Herman Reuters, and John Watts, editorial employees and Guild members who worked at the copy desk, that he believed in unions, but thought that the C. I. O. was carrying things too far. He inquired, 'You fellows belong to the C. I. O., don't you, the Guild?' "

These expressions on the part of Mr. Swisher were merely legitimate expressions of opinion upheld by the Supreme Court in *National Labor Relations Board v. Virginia Electric & Power Co.* (Commerce Clearing House, 5 labor cases, Section 51,124, decided December 22nd, 1941), 62 S. Ct. 344, and in no wise constituted either interference with the rights of the Guild members or restraint or coercion upon them. Lindsey, Reuters and Watts continued in their Guild membership and in the employ of respondent up to the time of the strike in May, 1938.

The Board's finding [A. R. 130]:

> "On one occasion after the Guild Convention, Young asked Johnson whether the Guild intended to organize the business department. At another time, the date of which does not appear in the record, he expressed the belief that the Guild should be limited to the editorial department."

Certainly such comment by Mr. Young was legitimate expression of opinion, and the record reveals no interfering, restraining or coercion of the same upon Johnson's activities which he exercised freely and fully up to the time of the strike. Johnson's testimony also warrants further examination since he was [A. R. 237] "one of the first temporary presidents" and "was the first newly elected president" in September, 1936, when the Guild was first organized. [A. R. 235.]

During the campaign for the election of Judge Palmer, general manager of respondent, as District Attorney, Johnson said [A. R. 237]:

> "I was invited at one time by the managing editor, Mr. Swisher, to speak on the radio from my desk

during the period of broadcasts that the Citizen News had for about a week. He asked if I would mind being introduced as the Guild president. I said no, although I was rather surprised, because that had never been done before, and I felt a great feeling of warmth because of it.

"He also asked me if I would mind talking about the Guild and explain its objectives briefly when I was on the air."

Johnson also testified [A. R. 244]:

"I remember very specifically a happy occasion in January when my wages were increased to $45, and in February of that year I was invited to go to the National Orange Show . . . Mr. Swisher took great delight in introducing me to some of his friends in the newspaper business in San Bernardino and elsewhere, as President of the Los Angeles Newspaper Guild, and kidding them and telling them that perhaps soon I would be over in San Bernardino to organize, too."

Also, [A. R. 244] Johnson participated one Sunday in a baseball game between teams representing the Citizen News editorial staff and the composing room. Judge Palmer was playing with them. "It was an exceedingly friendly baseball . . .,". Johnson broke his ankle and at the hospital [A. R. 245] he had calls from

"Zuma Palmer, Judge Palmer's sister, Mrs. Harold Swisher, the managing editor's wife, Mr. C. D. Thompson, secretary to Judge Palmer. Mr. Thompson at the outset told me that Judge Palmer stood ready to help me financially at the hospital, . . ."

Henry Reynolds [A. R. 463], a witness called by the Board, applied to Swisher for employment as a copy reader. Swisher

> "couldn't tell me immediately whether there was work there for me. He asked me if I was a member of the Guild. I said, 'Technically I probably am not, because I am in arrears on my dues, but I am for the Guild and believe in the Guild.' He said, 'Oh, I do, too, but I don't think the Guild should dictate who the Management should hire, do you?' He said also that 'We have 100% organization here, and Mr. Roger Johnson is one of the former presidents of the Guild.' "

There appears to be no testimony to support the Board's finding that Swisher talked "economics" and "ethics" with Crow. We do find, however, [A. R. 397] Crow testifying in reference to Swisher.

> "He said, for example, in the case of the Brooklyn Eagle strike, that he didn't see what they had gotten. He said the same thing about the settlement of the Seattle Post-Intelligencer strike, and the same thing of the Seattle Star strike."

Crow's position as Guild leader was well known to Mr. Swisher, and yet there is not the slightest evidence of any interference with Crow's activities. His comment that the Guild had gained nothing from certain strikes was again an expression of his own opinion which he was entitled to make.

Crow relates [A. R. 411]:

> "Mr. Swisher had spoken to me about guild shop and had asked me to explain to him in a conference in his office between himself and me. I explained

> Guild shop to him, and he told me that that was not the way it was explained in the first contract proposal . . . Mr. Swisher said to me at that time, 'I have no objection to telling a man that he has got to become a member of the Guild when he gets a job here.'"

Regardless of whether Mr. Swisher was reflecting his own opinion or that of the Management, as the Board charges, his attitude would not constitute interference, restraint, or coercion.

Johnson described his relations with Mr. Young [A. R. 239]:

> "In late December (1936), I met Harwood Young, the business manager of the Citizen News, . . . He asked me if I could get for him some information about wage schedules and other working conditions which had been put into effect on the four downtown papers about a month before . . .
>
> "I obtained the information for him, leaving the office and coming back with it . . . I went to Judge Palmer's office, . . .
>
> "I presented the information to both of them (Mr. Young and Judge Palmer) . . . I explained that I was in the Guild because I felt that newspaper men, acting as individuals, could not make the progress that they could by banding together . . . I laughed and pointed to Judge Palmer and I said 'I don't blame you or any of the other publishers as individuals. I blame the system' . . . Mr. Young and Judge Palmer laughed heartily at that. On the whole, it was a very splendid meeting, and I felt that if the Judge and Mr. Young understood my position in the Guild that they would be sympathetic."

In October (1937) Johnson [A. R. 255]:

> "went to Harwood Young, business manager, and told him that some of the display men were complaining to me that they were being required to work Saturdays now which was something that had not been required of them very much in the past . . . that the display men felt that their interest in the Guild and their activities in the Guild had aroused the ire of Mr. Brandon who had ordered the Saturday work . . . that if the men were required to work on Saturdays that it was essential they be given an explanation as to that and should be told by him or some person in authority that it was not because of their Guild activities . . . [A. R. 256.] He (Young) said yes, that Mr. Brandon had done this thing hastily; that it was a bad thing to do; and that Mr. Brandon in the past had from time to time caused the management embarrassment because of his quick temper . . . the conversation ended when he told me that he would talk with Mr. Brandon and see if he couldn't correct the misapprehension and have some of the men, perhaps, not come down on Saturday if the display department could operate efficiently that way."

Johnson further said [A. R. 257]:

> "Several times I was permitted, with the permission of the management, either Judge Palmer or Mr. Swisher, to do some outside publicity work . . . Harwood Young [A. R. 258], the business manager, asked me if I would like to handle Santa Claus Lane publicity . . . I repeated the same thing last year; that is, in December, 1937, again at the request of Mr. Young . . ."

Mr. Crow says of Mr. Young [A. R. 398]:

> "A matter of which Mr. Young spoke to me about on several occasions was the Guild's use of outside negotiators. His favorite objection to the Guild's use of outside negotiators was the fact, as he called it, that it put Judge Palmer in the position of the less reputable publishers. And I answered him by saying that we weren't necessarily calling a man an adulterer to ask him to abide by the ten commandments."

Mr. Young, just as Mr. Crow, had a perfect right to express his opinion as to methods used in collective bargaining negotiations, such arguments involved in collective bargaining are not interference with the rights of workers and the Board has already found that the respondent did not refuse to bargain.

Mr. Wynn's conversations with Mr. Johnson were, according to Johnson, as follows [A. R. 246]:

> "He particularly asked me from time to time when the Guild was going to ask for a contract with the Citizen-News . . . I told him that . . . we didn't know when we were going to the Citizen-News . . . He said that he wondered if the Guild was not paying too much attention to the economic phases rather than to the ethical phases. [A. R. 247.] My reply to that always was that I felt that the Guild should not emphasize the financial and economic phases so much, and that it should pay a great deal more attention to the ethical part of it, and to the matters that pertained to the freedom of the press and the ability to write frank and honest news."

Such conversation between Mr. Wynn and Mr. Johnson does not reflect any attempt on the part of the management to interfere with, coerce or restrain employees in the exercise of their organizational rights. On the contrary it reflects, if anything, a friendly recognition of those rights—a recognition that Roger Johnson was a leader in the organizational activities and that it was expected that he would carry on his activities according to his own plans without interference in any manner from the management. All of Johnson's testimony as to his union activities indicates clearly that he carried them on freely, openly and without restraint, interference or coercion.

The Board finds [A. R. 130]:

> "On one occasion the manager of the classified advertising department told Karl Schlichter that Palmer would never sign a union contract and that the editorial employees were making a mistake seeking higher wages."

The exact testimony as it appears in [A. R. 278] is as follows:

> "He said that he thought that the editorial workers were making a serious mistake to attempt to get higher wages. I said why did he think so. He said, 'Well, the judge will never sign a union contract.'"

The history of the negotiations, as reflected in Board's Exhibit No. 4 [A. R. 283-362], is conclusive evidence of Palmer's willingness to bargain, to put into writing and to sign a collective bargaining agreement. Note also the testimony to the same effect of James Francis Crow, Chairman of the Hollywood Citizen-News Unit [A. R. 415 to 449 incl.].

Miss Kavalosky, a witness called by the Board, a classified employee, testified about Tobin as follows [A. R. 385]:

> "The very day the strike was called on Tuesday, my boss, Mr. Tobin, approached me on the picket line and invited me to lunch. While we were sitting and having lunch, Bill Hawkins, who is Judge Palmer's brother-in-law, came in and sat with us, and also Pat Killoran, the fashion editor who joined the strike, and my boss seemed very much concerned because I had worked my job up to the point where it was better than it had ever been in the nine and one-half years that I had worked there, and he assured me that he felt I was very sincere in my move; and also told me that he had more respect for me on the picket line than he had for any people that had walked through the picket line and had gone to work in the plant. And at the same time we were sitting there, he merely said to me that he hoped that everything went well with me, and wished me good luck."

The Board next says [A. R. 130]:

> "The burden of discouraging union activity among the employees of the business department seems to have been taken up by Brandon, the display advertising manager." [A. R. 131.] "In October, 1937, Brandon applied for membership in the Guild and urged Johnson to secure his admission. The Guild refused to accept him as a member, fearing that his move was an attempt to dominate the Guild or at least the advertising salesmen in it."

The fact that the Guild did not recognize Brandon as representing the management is established by the testimony of Roger Johnson, heretofore quoted, to the effect

that Johnson went to Young as a person in authority to ask that Young change Brandon's orders in reference to Saturday work. Karl Schlichter, a Board witness and a member of the Guild, whose activities were not interfered with in the least, testified [A. R. 280-281] as follows:

> "S. C. Montrose, one of the salesmen, arose and said that he would move that we ask the management to give more authority to Harry Brandon, sales manager, inasmuch as he had some very good ideas that he was never permitted to carry out; that he didn't have the right to select his own staff. Jim Fisher got up and questioned him to this effect: 'Do you mean that you want us to suggest that Harry Brandon, our boss, be given the right to hire and fire?' He said, yes, he thought that Harry Brandon should have that right. It wasn't very long after that that Harry Brandon requested membership in the Guild, and at a Guild meeting at which his application was brought up, Montrose spoke at some length, possibly two hours, without interruptions, . . . in favor of the acceptance of Brandon's application. I discussed this matter with Jim Crow, Jim Fisher, and others, and I told him that I *felt* this was an attempt to have Brandon dominate the Guild, and that I was very much against the acceptance of Brandon as a Guild member."

Schlichter said that he *"felt"* and the Board concluded that "The Guild refused to accept him as a member, *fearing* that his move was an attempt to dominate the Guild."

Such a misinterpretation of testimony is neither substantial nor acceptable evidence. Schlichter's testimony clearly indicates that Brandon did not have the right to

hire and fire and that he had very limited authority from the management.

Schlichter further said of Brandon [A. R. 282]:

> "Brandon said that if he were a member of the Guild he would be very much ashamed to belong to any organization that had settled the dispute which involved the lowering of salaries of some of the workers on the paper . . . He said that the editorial workers on the Citizen-News were not worth greater salaries than they were getting; they couldn't possibly hold a job on any other paper, any other metropolitan paper."

Schlichter's testimony reveals nothing other than an argument over the Guild between two employees, one of whom had been denied membership and the other of whom had advocated the denial. There is not an iota of testimony to support, and the testimony actually disputes, this finding by the Board [A. R. 131]:

> "Thus for a period of over a year, the respondent conducted a campaign of criticism and disparagement of the Guild. The purpose of the campaign is made all the more apparent by virtue of its relative intensity in the business department shortly before and after June 1937 when the Guild convention voted to extend its jurisdiction to employees of that department."

The evidence reveals that business department employees were freely joining and participating in Guild meetings and activities. Lowell Redelings, a witness called by the Board, testified [A. R. 464]: That on the morning of the strike there were 25 paid-up members in the Citizen-News Unit of the Guild and 23 other members who were not paid up. Of the 25 paid-up members nine were in the

editorial department. Sixteen of the 25 paid-up members were therefore members of the business department. This indicates that the Guild, until it called the strike with the vote of 12 members [A. R. 366], was making as good headway in the business department as in the editorial department.

The Board finds [A. R. 132] that:

> "When the editorial department employees informed Palmer that they would not violate the Guild constitution and deal directly with him through a committee, Palmer asked, 'Don't you know what you want? Can't you make up your own minds? Do you prefer to have someone in Washington or New York or some place dictate to you?' "

Mr. Crow, Chairman of the Citizen-News Unit of the Guild, a witness testifying on behalf of the Board [A. R. 399-400] [A. R. 414-416] gives us the story of this meeting:

> "I was spokesman for this meeting . . . Judge Palmer said, taking a piece of paper and placing it before him on the desk, 'What I want is a schedule of wages and a schedule of hours.' We said that we did not propose to name figures and wages, or name any schedule of hours specifically . . . the Judge said 'What do you want,' we said that we wanted to be represented by the Los Angeles Newspaper Guild . . . [A. R. 400.] Subsequent to that conference, there were certain adjustments made in salaries in the editorial department. A noteworthy feature of the adjustments was the fact that I was given a $5.00 increase in salary, and the title of drama editor which was held previously by Miss Elizabeth Yeaman . . . [A. R. 401.] Mr. Swisher told me that the order was not his own; that it had come from Judge Palmer."

Mr. Crow was asked [A. R. 413]:

"Didn't you also at that time suggest raises for other people besides the drama editor? A. We did not name any person . . .

Q. [A. R. 414.] To refresh your recollection, didn't you also at that time suggest on behalf of this committee a raise for Mr. Scott? . . . A. I think we suggested a raise for Mr. Scott, and also many others.

Q. Did you also suggest a raise for Mr. Reuter? A. We suggested that one of the positions for which a peak or unusual salary should be paid was the position of Number One man on the copy desk.

Q. And the position that you were talking about at that time was that held by Mr. Reuter, wasn't it? A. [A. R. 415.] In my own mind, I assumed at that time that that was Number One position on the copy desk, although Mr. Swisher might have assumed something different.

Q. Now, as a matter of fact, you also suggested at the time a raise for Claude Newman, didn't you? A. We suggest that the position of sports editor should be paid a salary higher than that of the dead level salary.

Q. As a matter of fact, isn't it true that all these three, in addition to yourself, were given raises shortly thereafter? A. I know that I was given a raise shortly thereafter. I believe I can say that is true.

Q. And it is true as to the other three, too; is that correct? A. That was."

The Board refers to negotiations with the classified department, saying [A. R. 132]:

"When the classified-advertising department employees, being desirous of acting through the Guild, re-

> fused to sign the contract offered by the respondent, Young informed them that their salaries would be the first to be reduced in the event that business decreased since the other departments would be protected under their contracts."

Helen Brichoux Kavalosky [A. R. 378], a witness called by the Board, started to work for the Citizen-News on January 2, 1929, went out on strike on the morning of May 17, 1938, sold classified advertising for almost nine and one-half years, was a member of a committee of her department that called on Mr. Young late in June, 1937. She testified [A. R. 380] that there was a meeting every morning for about a week, at least five or six, all of which she attended, to discuss individual and collective job problems and working conditions. Next to the last session that the committee had with Mr. Young [A. R. 382] Miss Kavalosky

> "Asked him why we should have to sign an agreement with the Company to get a raise. I said that we had never had to sign an agreement before with anybody [A. R. 383]; I mean, we weren't the kind of people that worked under a contract or anything, and we just wanted to improve ourselves; that we worked for the Company a long time; we always trusted the Company, and they certainly always trusted us. There was no reason why we should break our word. And I asked him if he wanted us to sign the agreement, and before he could answer me, Mr. Tobin, my boss, spoke up and said, 'Why certainly you want them to, don't you, Harwood?' Mr. Young quickly said, 'No, no. They can do what they want.'"

The Board says [A R. 133]:

> "It is apparent that the respondent altered its policy of dealing with its employees in order to head off the organizational campaign of the Guild."

There is not an iota of evidence, substantial or otherwise, to justify this statement.

The Board in its findings [A. R. 133] refers to a conversation that Jake Calkins, a Guild member, had with Mr. Swisher and other conversations that Swisher had with Swan and one that Swisher had with Crow with reference to Swan, and another that Young had with Schlichter in reference to Stan Speer. We call the court's attention to the testimony [A. R. 452, 455-457] in reference to Calkins; the testimony [A. R. 461 and 483-485] in reference to Swan; and [A. R. 375-376, 483] in reference to Speer, none of which supports the Board. It does indicate that during the period of bargaining with the Guild, Mr. Swisher and Mr. Young legitimately sought to point out weaknesses in the Guild's demands.

Calkins.—[A. R. 452, 455-457]: At the negotiation meeting the night before, Garrigues in arguing against combination jobs in general had used in one of his general explanations the term speed-up and stretch-out. The following morning I had completed my writing portion of my job, and along about 11:00 o'clock I had a series of phone calls to make. In the interval I was sitting at my desk. Mr. Swisher arose from his desk which was about 30 feet from mine and walked to me and said "Jack I don't understand you." So I started to pursue the subject a little further and he turned his back and went back to work. That afternoon after the paper had gone to press things had relaxed a little bit in the office, and I went

into Mr. Swisher's private office and told him that I did not see what was behind his remarks to me. I couldn't understand why he had singled me out for either of the two comments that had been made that morning and that apparently there was some misunderstanding in his mind. *I wanted to know what it was.* He said, "well, it's this argument about the reporter and photographer business at the meeting last night." And I said "Well, you know it's the Guild position to combination work on any staff, and it is written into almost every Guild contract in the country, with the necessary exceptions." I forget further details of the conversation, except toward the end he said, "Well, Jack, the Guild is off on a wrong foot this time. *I'd be willing to scrap for more money for you guys,* but the 5-day week wouldn't work in this staff. I told him I couldn't discuss that matter with him, and I said it was a matter for open discussion. Any discussion between the Guild and himself was the matter for discussion by the negotiators before the observers. I was only there to try to iron out the remarks to me. He said that was all right, and he said he was glad I talked to him.

In re Swan.—By Swan [A. R. 461]: He (Mr. Swisher) said that if the management had granted us the wages or other provisions of the contract it would be necessary to retrench and I would have to go. By Crow [A. R. 483-485]: Mr. Swisher spoke directly to me about Al Swan during the course of the negotiations. At one time he said that the negotiations were presenting the management with a very difficult problem in the matter of Al Swan, because Mr. Swisher said that I knew as well as he did that A. Swan would never make a reporter—I did not, by the way, conclude on that state-

ment—"and if this contract goes through the way you fellows want it, the only thing we can do is give him his severance pay and let him go."

In reference to Speer.—By Crow [A. R. 483]: He is referred to ordinarily as an office boy. He handles the printing room work and he does, or did, rather, writing for the sports department. Q. In what way did negotiations effect Mr. Speer's position? A. . . . by the statement from the management that in one case this sports writing done by Speer was something that should be dispensed with, and by referring to it as fun rather than as a legitimate part of the work done in the editorial department. By Schlichter [A. R. 375-376]: I was in his (Mr. Young's) office discussing my work, and brought up the fact that business was very poor, and said, of course, the Guild people didn't take that into consideration when negotiating for a contract, and he said, as a mater of fact, the negotiators are not interested in geting a contract, they wanted to prolong the discussion in order to get more money and then discussed one thing after another with regard to this contract . . . severance pay . . . progressive wage scale. He mentioned two people, one by name, whom he said they would have to get rid of. Q. Who was that? A. Speer . . . He said that they could not possibly let him progress to a higher pay because of a speech defect, because he couldn't do the work.

The Board, it clearly appears, is erroneously attempting to hold that in bargaining with a union an employer must not say anything in his own behalf but must accept every demand and agree with every statement made

on behalf of the union. The evidence establishes that respondent took no action that interfered with the right of its employees to join a union of their own choosing, that the employees exercised that right and that the respondent bargained with representatives of their union.

Johnson, Crow, Schlichter, Swan, Speer, Reuters, Calkins, Kavalosky, Killoran and Lindsey were all members of the Guild participating in its activities without interference or restraint. Nothing said to them by any representative of respondent did anything more than to cause their disapproval. It didn't affect their exercise of their rights in the least.

(B) Case No. 9995.

The Board's order in this case is based upon findings of fact that are not supported by substantial evidence.

The Unfair Labor Practices.

A. Background.

Under the designation of "Background," the Board says [A. R. 90]:

> "In order to remedy the effects of respondent's interference, restraint and coercion, the Board ordered the respondent to post notices stating that it would cease and desist from such conduct. The respondent has not complied with this order. Harlan G. Palmer, president of the respondent, stated at the hearing in the instant proceeding, 'We have no intention to do so until the Court orders us to do so.' Nor has the respondent complied with the Board's order in an-

other case decided September 1, 1938 in which the Board concluded that the respondent had engaged in unfair labor practices in violation of Section 8 (1) and (2) of the Act."

The Board omitted saying that while it had seen fit to ask the Court for an enforcement order in a case decided on March 26, 1940, it still had not asked the Court for an enforcement order in a case decided September 1, 1938. Respondent does not apologize for the fact that it believes the Board is in error in all of its charges against respondent.

B. Interference, Restraint and Coercion.

The Board finds [A. R. 91]:

"Immediately after the editorial employees returned to work, however, they were deprived of their by-lines because, in the words of Swisher, the city editor 'the ill will created during the strike made it difficult for readers, particularly advertisers, to see the name of various former strikers without becoming alarmed at the name, recalling old feelings from the strike.' We find that the strikers were deprived of their by-lines because of their participation in the strike."

From the above quotation by the Board, it is apparent that any deprival of by-lines was not because of participation in the strike but because of conditions that existed after the strike. There is more to be noted in this connection:

1. The Board's complaint raised no issue as to by-lines.

2. The only testimony as to by-lines was that of Roger Johnson [A. R. 418-426]. Johnson said that prior to the strike some of the people used by-lines on their stories, that by-lines were eliminated after the strike and were "not immediately" given to the people who had been on strike. There was not an iota of evidence that at the time of the hearing, or the filing of the complaint, the Guild or any employee was raising any issue about a by-line. The statement of Johnson "not immediately" means that by-lines were eliminated for only a very brief period. It should be borne in mind also that Johnson resigned as an employee of respondent in October, 1939. [A. R. 422.]

3. An examination of the Board's Exhibits 17A, 17B, 17C, [A. R. 606, 615-616, and 625] reveals that in the three different contracts with the Guild, two of them subsequent to the Board's decision in Case No. 9994, the matter of by-lines was covered completely in the agreements as follows [A. R. 606]:

> "The publisher agrees that no employee shall be required to have published under his own name any material containing an expression of opinion not in conformity with his own opinions. Nor shall the by-line of any employee be used without his consent."

In other words the question of whether by-lines were to be used at all was entirely a matter of discretion for the publisher excepting that the by-line of an employee could not be used without the employee's consent.

The conversations between Killoran and Young to which the Board refers [A. R. 92] as indicating that the respondent interfered with union activities of its em-

ployees, plainly indicates the contrary. Young made some comments on union matters and then said [A. R. 355-6]: "I can't talk about those things because I am not allowed to," but Killoran replied, "Well, I can talk about them."

The statement of Mr. Swisher cited by the Board [A. R. 93] does not indicate interference with union activities. The National Labor Relations Act, as the Supreme Court has said in *National Labor Relations Board v. Virginia Electric & Power Co. (supra)* does not deprive employees of the right to express their opinions. Killoran said [A. R. 382] that after she had circulated a resolution in the composing room Mr. Swisher told her he wanted her to keep out of the composing room because she was causing trouble out there just as she was causing it down stairs every time she had a chance. [A. R. 383.] When she put an item on the Guild's posting board in the editorial room to the effect that the Guild was the victor in the Chicago strike, Swisher said that anybody who would put up a false statement like that couldn't be trusted to do anything. [A. R. 384.] Mr. Swisher, she said, also told her that the Guild was not a reputable organization. He told her that the Guild had lost the Chicago strike. The merits of the arguments need not be gone into. Swisher had a right to his opinions and Killoran to hers. Killoran kept right on with her activities and kept her job.

The Board says that Herbert Sternberg, who talked with Killoran, was classified advertising manager. Sternberg, according to Killoran, told her that she had made a monkey out of herself during the strike and that the

C. I. O., the Guild and the strikers were terrible. Herbert Sternberg was not classified advertising manager, was not a supervisory employee with right to hire and fire, and there is not a scintilla of evidence to that effect. But either as a supervisory employee or a fellow employee, he had a right to express his opinions about unions just as Killoran freely expressed herself.

When the Board says, therefore [A. R. 93]:

> "By the statements of Young, Swisher and Sternberg, and by its action in depriving the strikers of their by-lines, the respondent has interfered with, restrained and coerced its employees in the exercise of the rights guaranteed in Section 7 of the Act,"

the Board makes an unsupported finding. Killoran was the President of the Citizen-News Unit of the Guild at the time of the hearing [A. R. 378], the Chairman of the Boycott Committee during the strike [A. R. 375], the editor and circulator of 12 to 14 [A. R. 380] different bulletins mailed to other Citizen-News employees for the purpose of winning members for the Guild [A. R. 390], the advisor of Lugoff and the drafter of his petitions [A. R. 412], the circulator of a Guild resolution among members of the mechanical force [A. R. 361], the advocate of union membership at the front business counter of respondent during business hours [A. R. 414], the conductor of union activities whenever she had free time [A. R. 378], the carrier of a banner declaring "Judge Palmer, Law Violator" [A. R. 374], the poster

of notices and published items on the Guild bulletin board in the editorial rooms [A. R. 383-4], an employee of respondent, at the time of her testimony, for 12 years [A. R. 350]; certainly she was not interfered with, coerced or restrained in her activities and yet she is the Guild member upon whose testimony as to her own experiences the Board relies to sustain the finding of coercion and restraint.

The conclusions drawn by the Board as to coercion and restraint are also completely disproved by the testimony in the case. Palmer testified that he was not opposed to unions, that he had issued notices to that effect [A. R. 568, 571-4], that the business agent of the Typographical Union had stated correctly in a National Labor Relations Board case (in 1937) that Palmer had always told him that whatever the majority of his employees wanted they could have [A. R. 166]. The three contracts made with the Guild show that he did bargain with union representatives. The petition which Lugoff said he was circulating on March 15, 1940 states Palmer's readiness to recognize unions [A. R. 227]. The resolution circulated by Killoran in the composing room [A. R. 361] contained a statement that the management would look favorably to the mechanical men joining the A. F. of L. Typographical Union. Many employees of respondent attended Guild negotiating meetings and continued in respondent's employ. [A. R. 324-326.]

Statement of Lugoff Case.

Leonard Lugoff was a salesman of classified advertising employed by the respondent, The Citizen-News Company, from 1934 [A. R. 183] to March 30, 1940. [A. R. 235.] He worked for the Hollywood Daily Citizen from 1926 to 1928 [A. R. 181], went to work for the Hollywood News in 1928 [A. R. 242], came back to Hollywood Daily Citizen a year later [A. R. 243], where he was discharged before 1930 [A. R. 243], worked on Beach papers for a short time, came back to the Hollywood News and was there when the Hollywood Citizen purchased the Hollywood News in 1931. He was employed by The Citizen-News Company for about a year when he quit. [A. R. 244.] He was then employed by the Los Angeles Herald for five or six months [A. R. 245], then on a local newspaper serving Venice and Culver City for about a year [A. R. 245], then didn't do anything until he obtained employment in the circulation department of the respondent in January, 1934. [A. R. 245.] In six months he obtained employment in the classified department of the same institution.

His department head was J. R. Tobin, who held the title of classified advertising manager. [A. R. 427.] Above Mr. Tobin in the organization was T. H. Young, who held the title of business manager. Harlan G. Palmer was general manager with authority over both Tobin and Young. [A. R. 130.]

In May, 1938 a strike was called against respondent by the Los Angeles Newspaper Guild to compel the reinstatement of five discharged employees. Leonard Lugoff was a member of the Guild at that time [A. R. 259]

but refused to join the strike and gave up his union membership. Helen Brichoux Kavalosky was the only member of the classified department to join the strike. [A. R. 260.] Before the strike three-fourths of the classified department employees were members. [A. R. 259.] There were about twelve employees in the department. [A. R. 265.]

The five discharged employees were Roger Johnson, Mellier W. Scott, Jr., Elizabeth Yeaman, Helen Blair Thurlby and Karl Schlichter. [A. R. 576-577.]

While the strike was in progress the N. L. R. B. held a hearing on charges filed by it against the respondent. On motion of the Board's attorney the charges as to Helen Blair Thurlby were dismissed. At the conclusion of the hearing the Board's Trial Examiner held that the discharges of the four were discriminatory and because of union activities.

Following the hearing before the Board's Examiner an agreement was reached for the settlement of the strike. [A. R. 563.] A copy of that agreement appears in the transcript as Exhibit A of the Answer. [A. R. 17 to 21.] The agreement provided that the strikers, including the discharged employees, were to return to work pending the final decision in the N. L. R. B. case. In the event the discharges were finally held to have been legal and not discriminatory, the discharged employees were to immediately resign or to be subject to discharge. The contract signed with the Guild at the same time [Respondent's 17C, A. R. 618 to 626] provided there were to be no discharges of any of the strikers for economy reasons prior to January 1, 1939. In July, 1938,

shortly after the settlement of the strike, Leonard Lugoff was discharged by Mr. Tobin. [A. R. 272.] He took his complaint to Palmer, general manager, and was reinstated. [A. R. 580.]

On the 28th day of March, 1940 [A. R. 582] the respondent received copy of the decision of the N. L. R. B. finding that the four discharges were not discriminatory and dismissing the charge in relation thereto.

Prior thereto Roger Johnson, Mellier W. Scott, Jr. and Helen Blair Thurlby had resigned. [A. R. 576-577.] On March 28, 1940, the date of the receipt by respondent of a copy of the Board's order there remained of the original five in respondent's employ, Elizabeth Yeaman and Karl Schlichter. [A. R. 576.] On March 30, 1940, Palmer, respondent's general manager, gave notice to Yeaman and Schlichter of their discharge. [A. R. 581-582.] At the same time he discharged Leonard Lugoff. The Board thereafter filed this action against respondent, charging that the discharges of Schlichter and Lugoff were in violation of the National Labor Relations Act. No charge was filed because of the discharge of Elizabeth Yeaman. Both the Board's Examiner and the Board held Schlichter's discharge to have been for good cause and not unlawful [A. R. 109] and at the same time held the discharge of Lugoff to have been unlawful. [A. R. 105.]

The Discharge of Leonard Lugoff.

To sustain the Board's conclusion that the respondent discharged Leonard Lugoff because of his union activities, the Board must impeach the testimony of the respondent's general manager, Harlan G. Palmer, who did the discharging, and who testified as to his reasons therefor. Palmer's testimony is direct and positive. He knew his reasons. The Board supports its conclusion by unsubstantial evidence, by surmises and guesses and does not impeach the direct evidence.

As a witness called by the Board, Palmer testified that at the time Lugoff was discharged in August, 1938 [A. R. 141] he reinstated him following a conversation with Lugoff in which Lugoff said [A. R. 142]:

> "that the strikers had been returned to their jobs, that five people we had discharged for economy were being reinstated until the end of the N. L. R. B. case, and that he, Lugoff, had not gone on strike and he did not believe that he should receive any less treatment than those who had been on strike."

Thereafter Palmer told Young [A. R. 143] that there was a great deal of merit in Lugoff's appeal and that since the company was taking back other people pending decision in the N. L. R. B. case there was no reason why Mr. Lugoff should not be given equal consideration.

Question by David Sokol (Board's attorney) [A. R. 145]:

> "Q. Now, why did you take Mr. Lugoff back in August, 1938? A. Because if we could take

back the others under force there was no reason why we shouldn't take Mr. Lugoff back under a gentlemanly appeal.

Q. Now under the same reasoning why didn't you extend your leniency to that particular day in March, 1940 when you discharged him? A. The reason then has (had) ceased to exist."

When Palmer was called as a witness on behalf of respondent [A. R. 563] he testified further [A. R. 580]:

"Mr. Lugoff told me that he had been discharged by Mr. Tobin . . . the Saturday before, and that he wanted to appeal to me on the basis of the injustice of the discharge, that we were taking back five people over which the strike had been waged whom we had claimed we could do without, whereas he was producing something for the Citizen-News and he thought it wholly unfair to discharge him, who had not been on strike, when those five were being reinstated . . . " [A. R. 581]. "I talked the matter over with Mr. Young, told him that I believed there was merit . . . in the basis of Mr. Lugoff's appeal, that it was unfair to him to lay him off at that time while five others were being reinstated, whom we had laid off prior to him, and that we had agreed that there would be no economy discharges of members of the Guild prior to January 1, 1939, and that I thought it fair that Mr. Lugoff be reinstated . . . He was reinstated . . . on my orders."

[A. R. 581-2]:

"Q. When Mr. Schlichter and Mr. Lugoff were discharged on March 30, 1940, how many days elapsed between receipt of word by you that the N. L. R. B. in Washington had decided that the

five discharges were not discriminatory and were not unfair labor practices and the time of the discharges of these two gentlemen? A. We received the word in the early morning mail Thursday.

Q. And that was Thursday, March 28, 1940? A. Yes, sir . . . I waited two days before discharging Mr. Schlichter and Miss Yeaman. There was nothing to wait on Mr. Lugoff. Mr. Lugoff's decision was reached on the basis of now all my obligation to him certainly had been wiped out and that I could then sustain the position of the classified manager, expressed earlier when he was first discharged in 1938 . . . I made inquiry of Mr. Young . . . to ascertain whether or not Mr. Lugoff was doing any better . . . [A. R. 583] the report was that he was not.

Q. I will ask you whether or not union activity of any kind or nature had anything to do with either of those discharges or with Mr. Lugoff's discharge? A. It did not . . . if Mr. Young had reported to me that Mr. Lugoff's production was good, he would have been kept.

Q. [A. R. 584.] Were the reasons given in the letters of discharge of these two employees, Mr. Schlichter and Mr. Lugoff, the reasons given by the heads of the departments to you? A. The reasons given to the employees were the reasons obtained from the heads of the departments as to why the services of those employees were unsatisfactory. My reasons were, as I say, based upon the decision that the time had come when I was permitted to act."

Following the discharges of Schlichter, Yeaman and Lugoff there were conferences with representatives of the Los Angeles Newspaper Guild in reference thereto. At the conclusion of the conferences, to wit, on April 16,

1940, Mr. Willis Sargent, attorney and representative of the respondent in the conference, wrote the Guild in part as follows [A. R. 587-9]:

> "The management and I have had an opportunity of considering each of the matters raised by the Guild and have reached a conclusion with regard to each of them . . . with regard to Leonard Lugoff, I am informed by the management that he was discharged at the end of the 1938 strike; that he applied for reinstatement on the ground that it was unfair for the management to discharge him when he had not gone out on strike while at the same time it took back five strikers whose services it did not need, and that because of his appeal in this regard he was reinstated; that the connection of each of the five persons with the paper had now been terminated; that in the opinion of the management Mr. Lugoff has not been doing as good a job as it believes can, and should be done, in the territory assigned to him; that the management believes that the territory justifies earnings sufficient to cover the minimum guarantee and that an agreement had been reached with Mr. Lugoff that if he did not reach the minimum guarantee he would be dismissed; that Mr. Lugoff's earnings did not cover the minimum guarantee so that from both this viewpoint, as well as that of his earlier appeal for reinstatement, the management sees no reason for continuing his employment. The management denies that Mr. Lugoff's dismissal was by reason of any Guild activity on his part, and the request for his reinstatement is denied."

To sustain any order against respondent the Board must impeach Palmer's testimony by substantial evidence.

(*National Labor Relations Board v. Union Manufacturing Co.* (C. C. A. 5, 1941), 124 F. (2d) 332.) The Board fails to meet this burden.

When called as a witness by the Board [A. R. 180] Lugoff testified [A. R. 189]:

> "I came into Mr. Palmer's office and Mr. Young and Mr. Palmer were seated there. I told Mr. Palmer that I wanted to speak to him about my discharge last Friday and he said for me to go right ahead and tell him all about it . . . I told him that I took up with Mr. Tobin before going on my vacation two weeks previously about my low production, telling him about the contemplated loan and getting Tobin's okay that it was all right to go ahead. I told him that now that I had a $300.00 debt on my shoulders and no job that I knew that Mr. Palmer himself was not legally responsible but the debt would nevertheless have to be paid and it would never have been incurred if Tobin hadn't told me that my job was okay . . . He thought a minute and he said 'Do you want us to pay *that $300.00* or do you want your job back?' I said naturally I had to work . . . [A. R. 191.] Mr. Palmer said nothing to me but 'Do you want your job back or do you want us to take over *the $300.00 loan?* . . .

There was no statement about the strike settlement agreement at all.

On cross-examination, Lugoff testified [A. R. 273]:

> "I spoke to Mr. Tobin about the low production before I went on my vacation . . . I said, 'Mr. Tobin, I am contemplating making a loan. I have to send my wife back East. It isn't imperative but

we think it is necessary. I know my production is low and I think it is mainly due to the strike conditions . . . I need $300.00 on this loan and if there is any possibility that you are going to fire me because of low production . . . [A. R. 274] let me know and I won't make the loan.' Mr. Tobin said, 'There is nothing to worry about. Go ahead and make the loan.'

Q. Did you make *the* loan through the credit union in the Citizen-News? A. No . . . I made *it* through the Bank of America."

After Mr. Tobin returned from his vacation, according to Lugoff [A. R. 275], Tobin said to him,

"'I am sorry but I will have to let you go. We have taken the strikers back and we have got to cut expenses.' . . . I recalled what he told me two weeks previously and that I had got *a* $300.00 loan on my shoulders with no chance of getting a job and he tried to tell me a man of my ability shouldn't have a hard time finding work . . . I said 'Well, you are beating around the bush . . . You promised me that my job was secure. I went out and got *a* loan and now I am stuck. He said, 'Well, the best thing I can advise you is to go and see Mr. Palmer.' I said, '. . . to hell with it. I wouldn't go over your head anyway . . .' Over the week end my wife had already been sent back East, I had *that* loan, *the* loan was spent . . . I got a little cool and started figuring it was to my [A. R. 276] advantage to see whether I could get *that* loan off my shoulders. That was, Mr. Palmer, the main reason I came to see you on account of *that* loan. I was deeply worried about that . . . I don't believe the Guild was brought up as far as Mr. Tobin and myself were concerned. It was a conversation

about the promise of having a job after I got *that* $300.00 loan . . . [A. R. 279.] I said, 'Mr. Palmer, I have been fired by Mr. Tobin last Friday and I would like to speak to you about that firing . . . At the time of the strike I was a member of the Guild but gave up my card . . . [A. R. 280.] Now, I have got *a $300.00 loan* on my shoulders with no job . . . I know there is no legal reason why you should be made to pay *that loan* but I am in a position where I don't know how I am going to pay it back . . . I merely suggested there was a moral obligation . . .' [A. R. 283.] I was . . . mainly interested in trying to protect that $300.00.

Q. [A. R. 338.] This loan of $300.00 that you said you had obtained, was that a loan on your car? A. I think it was, yes."

Following Lugoff's testimony that he had secured this loan of $300.00 on his car from the Bank of America, respondent called as a witness Harry A. Haas [A. R. 550], an employee of the Bank of America, Hollywood main office, 6331 Hollywood Boulevard, who brought with him, in response to a subpoena, the bank records pertaining to loans made by Leonard Lugoff during the year 1938. Mr. Sokol, the Board attorney, thereupon offered to stipulate [A. R. 551] "that on July 27, 1938 Mr. Leonard Lugoff made a loan from the Bank of America in the total sum of $165.00; that in addition to that loan on that date there was outstanding from a previous loan the sum of $32.50." Witness Haas thereupon testified that the date of the previous loan was June 18, 1938 [A. R. 552] in the sum of $45.00. The $165.00 was loaned with an automobile as security. The earlier $45.00

loan [A. R. 553] was an unsecured loan. The balance on the June $45.00 loan was paid [A. R. 554] on August 19, 1938, a few days after obtaining the larger loan, the final payment being $25.00.

Immediately upon the conclusion of the testimony of Mr. Haas, Mr. Sokol, the Board attorney, stated [A. R. 554-5]:

> "I think there has been an implication left in the record, in that Mr. Lugoff testified that he got $300.00 from the Bank of America, and I can put Mr. Lugoff on on this phase of it if you desire."

Mr. Lugoff, recalled by Mr. Sokol [A. R. 593] was asked by Mr. Sokol:

> "Q. Can you explain the facts that the records of the bank show that you only borrowed $165.00 from the bank? A. Yes. The bank—my wife and I talked it over, and the bank limited me in the first place to a sum around that amount, and we borrowed the amount from the bank that we could straighten up with them inside of a year, then we went outside, from the family, and got the rest. I might add at this time that it was a sick sister in New York that had suddenly developed cancer; and it was partly the family affair . . .
>
> Q. [A. R. 594.] Did you tell the company you borrowed $300 from the bank? A. I didn't mean to give that interpretation. I meant I incurred an indebtedness of $300."

[A. R. 596.] Cross-examination of Lugoff:

> "Q. From whom did you borrow the difference betwen $165 and the $300, Mr. Lugoff? A. From my brother-in-law.

Q. How much did you get from him? A. $150.

Q. Did you get that by check? A. I don't know I don't believe so—my wife got it . . .

Q. Your wife got it from Harry Gold? A. That's correct.

Q. Is he her brother? A. He is her brother.

Q. Was the money deposited in any bank account? A. No, she took it to New York with her.

Q. Was the money obtained from the Bank of America deposited in any bank account? A. No."

Note that the Board introduced this testimony at the close of the case. Note that Lugoff got $45.00 prior to the time he claims he asked Tobin about the security of his job, and that after he paid off $32.50 from this $45.00 loan of June 18, he had $132.50 net and this is without reference to the amount it took to pay off the balance of any previous loan on his car, but he says he told Palmer there was "a moral obligation" to pay "that $300.00 loan."

Regardless of the efforts of Mr. Lugoff and the Board's attorney to remove what the Board's attorney said was an "implication left in the record that Mr. Lugoff had borrowed $300.00 from the Bank of America," we contend that the explanation does not remove the implication, because, until the representative of the bank was produced in court, Mr. Lugoff's testimony was direct and unequivocal that he had borrowed $300.00 from the bank against his automobile as security. Repeatedly throughout his testimony, prior to the appearance of the bank's representative, Mr. Lugoff referred to "this loan," "that loan," "a loan," "a $300.00 loan," "the $300.00 loan," "that $300.00 loan," "this $300.00 loan."

If Lugoff told his employer there was "a moral obligation" for the employer to pay "that $300.00 loan" Lugoff knew that he had obtained only $165.00 from the bank, less the $32.50 due on the prior unsecured loan, which was paid off immediately following his obtaining the loan on the car, and less whatever sum was necessary to pay off any balance of the previous loan on the car.

In his endeavor to explain that which the Board's attorney referred to as "an implication," Lugoff said that he did not borrow any additional funds but that his wife borrowed additional funds from her own brother in order to visit her sister who was also her brother's sister who had suddenly become sick with cancer in the East.

Would any member of this Court be willing to employ Mr. Lugoff in a representative capacity?

The Board refers to a statement in the answer of respondent to the effect that Lugoff was reinstated in 1938 [A. R. 96]: "On the same ground as the other employees who were reinstated pursuant to the strike settlement agreement." The Board implies that there was testimony to this effect and repeats this reference many times throughout its findings. There was no such testimony. The fact that the Board found it necessary to set up a straw man by repeatedly resorting to a statement in the answer and to disregard the evidence, demonstrates the Board's own opinion that there was no substantial evidence to support its findings.

The Board states erroneously [A. R. 96] that Palmer testified "in support of respondent's contention that Lugoff was discharged 'pursuant to the agreement under which he had been reinstated.'" The evidence clearly shows

that Palmer did not so testify. If a statement in the answer differs from Palmer's testimony, the testimony and not the pleadings govern. We do not admit that the Board could make a case if it were legal for it to ignore the evidence and look at the answer, but certainly it makes no case when the evidence is considered. The Board, it is to be noted, failed in many respects to sustain its own pleadings by the evidence. If the pleadings were to govern there would be no need for trials, findings and appeals to this Court.

The Board in its findings [A. R. 94] refers to the so-called union activities of Lugoff, which it concludes were the cause of Lugoff's dismissal. The Board ignores the fact that there was no testimony whatsoever to the effect that knowledge of Lugoff's alleged activities ever reached Palmer. Tobin admitted only that he heard reports of the circulation of one petition in 1939.

> "Q. [A. R. 510.] (By Board's attorney.) When did you first learn of any attempt to organize the classified employees? A. (Tobin) I don't believe I ever did have any definite information that they were trying to organize the department.
>
> Q. What about this petition that Lugoff was circulating? . . . [A. R. 511.] What kind of a petition was it? A. I don't know—I never saw the petition; never even made any inquiry about it.
>
> Q. When did you hear about the petition? A. I don't recall.
>
> Q. Wasn't it just prior to Mr. Lugoff's discharge just a week or two? A. I am quite sure it wasn't . . . It seems to me it was sometime before that . . . several months [A. R. 512] nearer the middle of 1939 than it would the early part of 1940.

The Board ignores Palmer's positive testimony that he had no knowledge of Lugoff's union activities [A. R. 579] that the discharges were made on his sole responsibility [A. R. 583] and that union activities had nothing [A. R. 583] to do with his decision to terminate Lugoff's employment.

The Board says [A. R. 94-95]: "In May he (Lugoff) *openly* circulated a petition authorizing the Guild to represent this group (classified advertising section) of employees."

That word "openly" was used by the Board as part of the foundation for its conclusions of law and its order. An examination of the evidence reveals this finding was wholly unsupported. Lugoff, on his direct examination, as a witness called by the Board, testified [A. R. 195] that in May, 1939 he went around with a petition . . . [A. R. 196] telling different members in classified that they could get the Guild to bargain for them without becoming members of the Guild providing they got a majority in classified to sign a petition. Three people, besides himself, signed the petition, making a total of four names on it. He needed a total of seven names to have a majority.

He testified that he circulated the petition right in the plant, that Tobin was around in the department most of the time, that [A. R. 197] "Tobin came in during the noon hour while I was speaking, talking *privately* to one or two of the employees of the classified." In testifying in reference to the circulation of a third petition [A. R. 228] Lugoff said: "The other petitions were circulated . . . to just a few." "Other petitions" would include,

therefore, the first petition of May, 1939 which the Board found Lugoff "openly" circulated.

On cross-examination Lugoff testified [A. R. 250]: "That from 1934 he was continually harassing Mr. Tobin in reference to compensation and working conditions."

In reference to the first petition Lugoff testified on cross-examination [A. R. 265] that he approached six out of a total of 12 in his department. The Trial Examiner [A. R. 266] informed the Board's attorney that the attorney had brought out on direct examination that Lugoff passed the petition "during working hours within knowledge of the respondent." Whereupon Lugoff stated,

> "I would like to make an objection to that statement 'working hours.' I did pass a petition around during the day but it was during the noon hour when we were supposedly at lunch . . . [A. R. 267] there were other times after hours, after five o'clock, that I walked up the street with them and talked about it to them too."

Three of the six people signed and three did not.

> "Mr. Tobin, during the lunch hour came in the office, sat down and went out . . . [A. R. 268] when I started circulating the petition, Mr. Tobin was not in but during the circulation he came in. I never circulated it at the time he was there . . . [A. R. 269.] Now, this first petition (the one of May, 1939) I doubt whether Mr. Tobin was in the office when I was circulating it . . . the first petition and that contract I made out following was given to people and was given to them in such a way, for instance, that—you see the people that I contacted

on this first petition and the contract were more afraid of their jobs than I was. There seemed to be a fear in the department that if the management caught them doing anything like that that they would lose their job and on this first petition and the following contract, the petition was left in their hands and I walked away. *There was nobody around. The signatures weren't obtained at the office. They were obtained at lunchtime while we were eating lunch."*

The Board says: "From the testimony of Tobin, who had admitted hearing 'rumors' of Lugoff's petition we are convinced and find, as did the Trial Examiner, that by May, 1939, the respondent was aware of Lugoff's union activity." From the quotations hereinabove made, it is apparent that the Board's conviction is contradicted by the evidence.

The Board finds that in August, 1939 [A. R. 95]:

"Lugoff engaged in an argument with another employee whom he accused of spreading rumor that the 'management was going to close down the plant if the Guild in its negotiations for a new contract didn't act reasonable.' During this argument George Palmer, son of one of the respondent's owners, interposed and declared, according to Lugoff's testimony, that he 'knew that (the rumor) was a fact and he was willing to gamble on it.' We credit Lugoff's testimony, as did the Trial Examiner."

The Board implies that such evidence, if true, would be substantial, and yet the fact remains that respondent completed the contract with the Guild [Exhibit 17-B, A. R. 609-617] and that during the negotiations [A. R. 315] no such threats were made by the management or

its negotiator and in fact that the negotiator stated that he had no knowledge of any threats being made. Palmer testified [A. R. 575] that he made no statement to the effect that the paper would close down unless the Guild was more reasonable in its demands.

The Board attaches weight to the fact that Lugoff's reinstatement was accompanied by a note, dated August 22, 1938, signed by T. H. Young, business manager, as follows [A. R. 98]: "You will be retained in your present position with final decision on January 1, 1939. The intervening period will be probationary." The Board says, and uses as an argument, "The respondent made no effort to explain why terms of reinstatement opposed to those upon which it [A. R. 99] asserts Lugoff was reinstated should be set forth in the letter."

The testimony of Palmer as to reinstatement and Lugoff's testimony about a $300.00 loan, went to the "why" of reinstatement—not the terms. The Board is again ignoring the evidence and looking at the pleadings.

The Board concludes [A. R. 99]:

> "we find that Lugoff's reinstatement in 1938 was not conditioned on, or connected with, the reinstatement of the other employees or the Board's decision in the earlier case, but instead was conditioned solely upon his satisfactory work during the probationary period established by the letter of August 22, 1938. The respondent's claim that Lugoff was discharged 'pursuant to the agreement under which he was reinstated' must be rejected."

The testimony offered by respondent was not that Lugoff was discharged, "pursuant to the agreement," etc. The

Board is again ignoring the evidence and looking at the pleadings. The Board again sets up its straw man to have something to knock down. Respondent bases its claim upon the evidence presented to the Board's Examiner as heretofore set out. Since the Board looks to the pleadings instead of to the evidence, it admits that the evidence does not support its conclusions. The Board also refers to the "conditions" of reinstatement, again ignoring Palmer's and Lugoff's testimony as to the "why" of reinstatement.

The Board says [A. R. 99]:

> "The respondent's claim that Lugoff's services were unsatisfactory, like its alternative assertion that Lugoff was discharged 'pursuant to the agreement under which he was reinstated' is not supported by the record."

Note here again in the reference to "alternative assertion" the insistence of the Board to set up the straw man and make a case out of a pleading when the evidence gives it no ground to stand on.

But let us consider the statement that "Respondent's claim that Lugoff's services were unsatisfactory" is not supported by the record. The Board [A. R. 101] notes that Lugoff was not discharged nor notified that he was still on probation after January 1, 1939. The Board ignores the fact that Lugoff averaged in earnings $25.05 a week for the last 13 weeks prior to January 1, 1939, and that he averaged $19.72 a week the last 13 weeks before he was discharged in March 30, 1940. [A. R. 175-177.] If the Board does not recognize the province of management then its order to respondent to reinstate

Lugoff amounts to an order to employ him for life regardless of what he might produce.

The Board further ignores the fact that a failure to discharge Lugoff until March 30, 1940, when the Board's decision was reached in the earlier case, supports Palmer's testimony as to his reasons for reinstating Lugoff after the first discharge.

The Board says [A. R. 100]:

> "In the normal course of business it was the duty of Tobin and Young to recommend discharges to Palmer and after obtaining his approval, make discharges, such practice was not followed with respect to Lugoff."

In making that statement and drawing an erroneous conclusion therefrom the Board ignores the fact that at the same time that Palmer discharged Lugoff, he discharged Schlichter and Yeaman; ignores the fact that the Board found the discharge of Schlichter to have been lawful; and ignores the fact that the Board did not even file charges against respondent for the discharge of Yeaman.

Called as a witness for the Board, Palmer explained why he did the discharging [A. R. 159]:

> "Q. What I am trying to ascertain is whether in the discharge of Mr. Schlichter and Mr. Lugoff yours was a secondary interest? . . . A. Well, no. Mine was the primary interest.
>
> Q. Why? A. Well, because I had been the one who had been the leader or at least carrying the brunt of the N. L. R. B. activities as I related, and I was the logical one to give the decision . . ."

It was logical that Palmer would make all three discharges and not ask Tobin to make one, Young to make one and Swisher to make one. Palmer testified [A. R. 583] that he asked Young to inform him whether or not Lugoff was doing any better, and that on being informed that he was not, Palmer terminated Lugoff's services at the same time that he terminated the others. Palmer, it must be kept in mind, reinstated Lugoff after Tobin had discharged him. It was therefore more logical that Palmer should order the subsequent firing of Lugoff than that Tobin should do it. There was no going over anyone's head in that second discharge. It was logical that Palmer do the discharging of Yeaman and Schlichter because their cases were involved in a N. L. R. B. matter and the responsibility rightly should have been taken by Palmer.

The Board states as a finding of fact [A. R. 101]: "Nor was Palmer able to cite a single complaint he had received concerning Lugoff's work during the period of his reinstatement." Let's examine Palmer's testimony when called as a witness by the Board. [A. R. 152]: He did not consider it important to find out how much money he was making on Mr. Lugoff's services,

> "as long as I believed that someone else could do better than Lugoff . . . I thought most anybody could . . . who would work hard. Mr. Lugoff in my opinion is lazy and I thought that most anybody who was enterprising could produce more than he . . . [A. R. 153.] I have seen him sleeping in his car parked along the street there in the afternoon . . . As a matter of fact I think Mr. Lugoff before his discharge was regularly loafing in the afternoon . . .

Q. [A. R. 155.] Had you ever complained about Mr. Lugoff? . . . A. No, I didn't have to. Others would complain to me.

Q. Who complained to you? A. Mr. Tobin, Mr. Young."

Tobin testified that he frequently saw Lugoff playing marble games in a barber shop during business hours. [A. R. 526-527; 540.] Palmer asked for a statement from Young as to whether Lugoff's work was satisfactory and received the answer that it was not. [A. R. 583.]

The Board says [A. R. 101]:

"the production records, which admittedly were prepared after Lugoff's [A. R. 102] discharge, are not conclusive. More significant, in our judgment, is the fact that although Tobin and Young were fully aware of the nature of Lugoff's work for a period of 19 months they did not see fit to recommend his discharge."

Let us consider the Board's statement that the figures of Mr. Lugoff's production are not conclusive. The Board means to say that in its judgment Lugoff was producing for his employer all that he should have produced. The Board has neither knowledge, experience, nor competency to substitute its judgment for the judgment of the management. In giving weight to the fact that the production records were prepared after Lugoff's discharge, the Board completely ignores the fact that the Board's Exhibits 6A-6B and 6C [A. R. 174-176] were records asked for by the Board's attorney [A. R. 203; 349] and that those records were compiled from records

kept currently by the respondent. The Board overlooks the fact that Lugoff testified [A. R. 211] that his "lineage had increased steadily from December on until March, 1940." Following his testimony and to show its falsity and to impeach the witness, Tobin testified from the records for which the Board had asked [A. R. 457-458], that whereas Lugoff's average weekly earnings between January 1, 1940 and March 28, 1940 were only $19.72, he averaged $21.41 between July 1, 1939 and December 28, 1939, and that as to lineage Lugoff produced during that period when he said he was steadily increasing, to wit: January 1, 1940 to March 28, 1940, a weekly average of 567 lines against a weekly average of 646 lines for the period July 1, 1939 to December 28, 1939. The Board cannot deny these figures but states that they are inconclusive. They are certainly conclusive (1) that Lugoff's production was not steadily increasing as he testified, and (2) that Young correctly informed Palmer that Lugoff was not doing better. We again call attention to the fact that the records [A. R. 175-177] reveal that the last 13 weeks before January 1, 1939, when Lugoff was on trial, Lugoff's average weekly earnings were $25.05, while the 13 weeks prior to his discharge his weekly earnings averaged $19.72. The Board's Exhibits 6A-6C [A. R. 174-176] also reveal that prior to Lugoff's receipt of a $24.00 a week guarantee in July, 1939, Lugoff produced more business and thereby earned more money that he did after the receipt of the guarantee. Those exhibits reveal that during the first 13 weeks of 1939, before the receipt of the guarantee of $24.00 a week, Lugoff's average earnings were $22.68. During the corresponding 13 weeks of 1940, Lugoff's average

earnings were $19.72. These records afford substantial, concrete and uncontradicted evidence that Lugoff should have been discharged. Naturally, until Palmer asked for their recommendation, neither Tobin nor Young would recommend Lugoff's discharge to Palmer in the face of the fact that Palmer had taken the responsibility for reinstatement after Tobin had discharged him.

The Board attaches weight to the fact that Lugoff, among four sales persons, was second high producer. The Board ignores the testimony of the classified advertising manager that Lugoff had the best territory [A. R. 481]:

> "there was much more potential advertising in that territory . . . that fact was borne out each week [A. R. 482] by the number of leads he would get from the other papers in his territory . . ."

The Board attempts to explain the evidence that Lugoff on a comparative basis was making a poorer showing than the three other outside sales persons by saying that Lugoff lost three accounts. Lugoff admited [A. R. 598] that selling classified advertising constantly involved "driving for new business" to get new accounts to offset lost accounts.

The analysis on the comparative basis was made by Harry R. Ringwald [A. R. 470], auditor for respondent, who testified that the total classified lineage of the paper for 1939 was 16.1 per cent less than that of 1937 and that of this total lineage, Reid's loss was only 6.9 per cent, Allen's loss was 30 per cent, McKellar's loss was 10.2 per cent and Lugoff's loss was 35.7 per cent.

The Board holds [A. R. 102] that more significant than the production records of Mr. Lugoff "is the fact that although Tobin and Young were fully aware of the nature of Lugoff's work for a period of 19 months, they did not see fit to recommend his discharge." The strike settlement agreement was signed on July 30, 1938. [A. R. 17-21.] Lugoff was discharged and reinstated about August 9, 1938. Palmer had over-ridden Tobin's previous discharge and taken the responsibility for Lugoff's case. The fact that either Tobin or Young recommended Lugoff's discharge until questioned by Palmer is evidence that they understood the reasons for Lugoff's reinstatement, that they understood the matter was awaiting the outcome of the N. L. R. B. case. The fact that they did not ask for Lugoff's discharge when the records clearly showed he was entitled to discharge supports Palmer's explanation of why he reinstated Lugoff.

The Board [A. R. 102], in its further attempts to substitute its judgment for the management's judgment makes light of the fact that Sellers, an inexperienced office boy, stepped into Lugoff's job and immediately did a better job than Lugoff had been doing. But this cannot be disregarded in judging Lugoff's fitness for employment. The progress that has since been made by Sellers as contrasted to the lack of progress by Lugoff, sustains the management's judgment and proves the incompetency of the Board as a manager.

The Board [A. R. 103] attaches weight, in support of its conclusions, to the fact that Sellers received the same minimum guarantee that Lugoff received. Since a minimum guarantee of $24.00 had been set up for the

department, there was nothing to do when it was decided to keep him in the job but to pay Sellers the same minimum that had been paid to Lugoff and certainly it could be paid to Sellers more cheerfully than it could be paid to Lugoff because Sellers produced more business than Lugoff did for respondent.

The Board finds [A. R. 103] that "Respondent also asserts that Lugoff was discharged because his commissions failed to cover his guaranteed weekly minimum salary." The Board again ignores Palmer's testimony and misinterprets respondent's Exhibit 16. [A. R. 589.] When the Guild representatives asked for the reinstatement of Mr. Lugoff after his final discharge in 1940 the respondent's attorney advised the Guild [Respondent's Exhibit 16, A. R. 589] that one of the reasons why the management would not reinstate Lugoff was because: "the management believes that the territory justifies earnings sufficient to cover the minimum guarantee."

The Board [A. R. 103] comments on the testimony as to Lugoff's sleeping on the job, failure to call on prospective clients when requested to, and playing marble games during working hours. The Board says:

> "The events in question occurred sometime before Lugoff's discharge and were either known to Tobin and Young at the time they considered his record and decided it did not merit discharge, or were not known until after Lugoff's discharge in March, 1940."

We call attention to the absence of testimony that Tobin and Young ever decided Lugoff's record "did not merit discharge." We call attention to Palmer's testimony that

when he asked Young if Lugoff was doing any better Young informed him that he was not. If Palmer had not taken responsibility for Lugoff, Lugoff would not have been working at the time.

The Board says [A. R. 104]: that Palmer's explanation for his discharge of Lugoff "would be applicable had Lugoff been reinstated on the same terms as employees reinstated under the strike settlement agreement." We have previously called attention to the Board's disregard of the evidence and its attempt to build a case on a statement in the answer. If the Board had not ignored the testimony of Palmer, the Board would have said that "Palmer's explanation of why he made the discharges was entirely consistent with Palmer's testimony as to why he reinstated Mr. Lugoff in 1938."

The Board says [A. R. 104]:

> "Lugoff was most active in organizing the respondent's unorganized employees and at the very time of his discharge was engaged in circulating a petition to that end."

We have previously commented upon the first petition which Lugoff said he circulated in 1938 to 6 of 12 employees in the Citizen-News and on which he obtained three signatures. Let us call attention further to the testimony of Lugoff [A. R. 259] that prior to the strike in 1938 three out of four of the classified employees were members of the Guild. And if respondent was not disturbed by that condition, certainly it was not disturbed, if it knew, that Lugoff had obtained three signatures including that of Helen Brichoux Kavalosky [A. R. 260], who was an active Guild member. Brichoux was still employed by respondent at the time of the hearing. [A. R. 260.]

Lugoff's circulating of a second petition some months after the first in which he called attention to a Guild contract with the Los Angeles Herald Express produced no different results, according to his testimony. [A. R. 308.] He circulated it among 6 persons and got 3 signatures.

About March 15, 1940, according to Lugoff [A. R. 329], he showed a third petition (Board's Exhibit 19). He obtained no signatures in the two weeks prior to his discharge. [A. R. 330.] This petition he said he showed to Whitebrook, Davis, Brichoux, Bovee and Allen. [A. R. 228.] Florence Davis, head of the 'phone room, said a petition like that would go over good. [A. R. 229-30.] The petition reads as follows. [A. R. 227]:

> "We, the undersigned, consisting of a constituted majority of workers of the Classified Department of the Hollywood Citizen News, believing, as the management has stated from time to time, that all workers of all departments in the Citizen News are entitled to the Rights and Privileges obtained by the Editorial department in its contract with the management, and, taking the management at its word when it further states that they the Citizen News, although believing that all the workers of all departments are entitled to these Rights and Privileges, will not bind themselves in any way to recognize such Rights and Privileges until the time that such departments do obtain a majority of workers in their respective departments and do then petition a bargaining agent under the National Labor Relations Act.
>
> "Therefore we do hereby petition the Los Angeles Newspaper Guild to act as the bargaining agent of the Classified Department of the Citizen News and do authorize them to obtain written commitment of such Rights and Privileges in a separate contract.
>
> "Signed:——"

The contents of that petition reveal that if the management had known about its circulation and contents, the management certainly would not have been disturbed. The contents of the petition not only reveal that its circulation could not have been the cause of Lugoff's dismissal but they also reveal the falsity of the Board's ruling that the respondent was interfering, restraining and coercing its employees in the exercise of their rights under the National Labor Relations Act. That petition establishes that the respondent had made it clear to its employees that they were entitled to all the privileges of the National Labor Relations Act.

Further, it should be noted that Patricia Killoran, head of the Citizen-News Unit of the Los Angeles Newspaper Guild [A. R. 378], prepared the petitions for Mr. Lugoff, that [A. R. 380; 390] she was active in many ways in promoting membership in the Guild, that whatever Mr. Lugoff did he did at her instance and direction, and that Miss Killoran was still in the employ of the respondent at the time of the hearing on this matter and had been so employed for 12 years [A. R. 350], that she had been through the strike [A. R. 375], that she had directed a campaign to induce advertisers to withdraw advertising from the newspaper, that [A. R. 374] she had worn a placard while parading in front of Hollywood business houses which read: "Judge Palmer Law Violator," that [A. R. 388] she had plainly and emphatically told Mr. Young that [A. R. 356] she could talk about unions to any extent she pleased, when Mr. Young told her that he could not talk about such matters. Helen Brichoux Kavalosky, a fellow employee of Lugoff's in the classified department [A. R. 260], a member of the

Guild before the strike, a participant in the strike, joined with Lugoff in signing his petitions. She has not been discharged.

The testimony of Lugoff indicates clearly that his union activities did not in the least disturb the management. His laziness [A. R. 499], his failure to make calls [A. R. 507] and his lack of diligence and production did disturb the management.

When Lugoff was discharged in 1940 he was paid severance pay [A. R. 333] according to the schedules set forth in the Guild contracts covering the editorial employees. [Respondent's Exhibits 17-A, 17-B, 17-C, A. R. 603; 612; 622.] The amount was approximately $200.00 [A. R. 281.] No offer to return the same has been made. [A. R. 282.]

Acceptance of that money by Lugoff was acceptance of his discharge. The two were tied together. If he did not intend to accept his discharge he had no right to accept the money paid in consideration of the discharge. He did not later discover anything that vitiated his contract of acceptance when he accepted the severance money. But if he had discovered anything the obligation rested upon him to tender the return of the $200.00 before seeking to set aside the discharge.

The National Labor Relations Act does not set aside the law of contracts. Whatever rights the Act guaranteed to Lugoff did not include the right to have his cake and eat it too. He cannot contend that his discharge was unlawful and at the same time accept the compensation that is incidental to a lawful discharge.

POINT III.

The Board's Orders Are Not Valid or Proper Under the Act.

Since respondent is neither engaged in inter-state commerce, in that its operations do not have or tend to have a close, intimate, or substantial relation to trade, traffic or commerce among the several states and do not constitute or tend to constitute a burden, hindrance, obstruction or interference upon or with such commerce, or the free flow thereof, nor does a labor dispute in respondent's plant or operations constitute or tend to constitute such a burden, hindrance, obstruction or interference upon or with such commerce, or the free flow thereof, it follows that respondent is not within the jurisdiction of the National Labor Relations Act or the National Labor Relations Board and that the two purported and alleged orders of the Board pertaining to respondent's business and operations are null and void for want of jurisdiction in the premises.

Further with regard to case No. 9994, the order of the Board is also invalid, illegal and wholly unenforceable in that the purported findings of the Board as to alleged unfair labor practices are not supported by or based upon creditable or substantial evidence, but on the contrary are merely unsupported inferences, conjectures, innuendoes and speculations indulged in by the Board in an effort to sustain its findings and order, and that the record is devoid of any evidence showing or tending to show that any of the purported acts or conduct of respondent alleged by the Board to have been done or engaged in by respondent, in any wise interfered with,

or in the internal affairs of, the Guild, or constituted refusal to bargain collectively with it on behalf of respondent's employees, or constituted illegal conduct during bargaining negotiations with the Guild, or interfered with or tended to interfere with the rights of respondent's employees, or otherwise constituted a violation of any of the rights or privileges of respondent's employees under the said Act or otherwise; and that on the contrary the record shows that respondent did bargain collectively each year with the Guild and entered each year into collective bargaining agreements with the Guild, on behalf of respondent's employees, that respondent's employees were permitted full and complete latitude in the exercise of their rights and privileges under the Act, that respondent's employees did freely engage in union activities without interference or discrimination by respondent, and that such expressions by respondent or its officers, agents or employees alleged by the Board to be illegal and in violation of the Act not only did not restrain either the Guild or respondent's employees, but constituted the exercise of free speech under the Constitution of the United States, as interpreted by the Supreme Court thereof.

Further with regard to case No. 9995, the order of the Board is also invalid, illegal and wholly unenforceable in that the purported finding of the Board that respondent discriminatively discharged Leonard Lugoff is not supported by or based upon creditable or substantial evidence, but on the contrary is contradictory to positive testimony, (1) that Lugoff was reinstated on a plea by him that he should be given equal consideration with strikers who were temporarily reemployed pend-

ing a decision by the Board, (2) that Palmer accepted the decision by the Board as the occasion for the discharge of Lugoff as well as the two other remaining reinstated employees, Schlichter and Yeaman, only after ascertaining that Lugoff's production had decreased and become unsatisfactory for the period immediately preceding his discharge, (3) that Lugoff's discharge by Palmer was consistent with the position taken throughout by Palmer and was made by Palmer without knowledge of Lugoff's prior union activities which, had they been known, were clearly within the scope of activities permitted and avowedly approved by Palmer and respondent as shown by uncontradicted evidence, (4) that upon his discharge Lugoff accepted and retained without objection by him substantial severance pay as set forth in the then existing agreement between respondent and the Guild to be paid in the event of such a discharge, and (5) that the record further shows that there were other uncontradicted acts and conduct by Lugoff justifying his dismissal at the time of his discharge. See *Burlington Dyeing & Finishing Co. v. National Labor Relations Board,* 104 F. (2d) 736 (1939), where a similar discharge took place under facts and circumstances somewhat paralleling those in this case, except that there the officers of the company were shown to have been opposed to labor unions, as was not the case with Palmer. Also see *Kansas City Power & Light Co. v. National Labor Relations Board,* 111 F. (2d) 340 (1940), where the court held that even where there was opposition to the Union, which is denied in the case at bar, and discharges of union members occurred, said discharges alone are not sufficient to justify a finding of an unfair labor prac-

tice under the Act unless said discharge was motivated by such opposition, which it is submitted was not shown by the record in the case at bar. Furthermore the presumption of the law is that the employer has not violated the law by the discharge of a union member, and the burden of proof is not upon the employer but on the one who asserts the fact to prove the discharge was made because of union activities. Where the Board has failed, as here, to meet the burden of proof, the petition to enforce the order must be denied. (*National Labor Relations Board v. Union Manufacturing Co.* (C. C. A. 5, 1941) 124 F. (2d) 332.)

Conclusion.

It is respectfully submitted that the Board's findings are not supported by substantial evidence, that its purported orders are not valid or proper, and that a decree should issue dismissing the Board's petitions for enforcement of its purported orders, as being beyond and without its jurisdiction, and otherwise illegal and invalid by reason of the premises.

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April 1942.